

BEFORE THE MISSISSIPPI ETHICS COMMISSION

WLBT, LLC

COMPLAINANT

VS.

PUBLIC RECORDS CASE NO. R-16-041

CITY OF JACKSON

RESPONDENT

FINAL ORDER

This matter came before the Mississippi Ethics Commission through a Public Records Complaint filed by Mr. Leonard Van Slyke, on behalf of WLBT, LLC (hereinafter “WLBT”) against the City of Jackson (hereinafter “the city”). The city filed a response by and through its attorney. The Ethics Commission has jurisdiction over this matter pursuant to Section 25-61-13, Miss. Code of 1972. In accordance with Rule 5.6, Rules of the Mississippi Ethics Commission, the hearing officer prepared and presented a Preliminary Report and Recommendation to the Ethics Commission at its regular meeting on February 2, 2018. The respondent did not object to the Preliminary Report and Recommendation and has thereby waived a right to a hearing on the merits. Accordingly, the hearing officer enters this Final Order in accordance with Rule 5.6, Rules of the Mississippi Ethics Commission.

I. FINDINGS OF FACT

1.1 On June 16, 2016, C.J. LeMaster, a reporter with WLBT, filed a public records request with the City of Jackson for “all tort claims brought against the City of Jackson, regardless of department, from January 2013 through May 2016.” Between June 28, 2016 and August 2, 2016, the city and WLBT corresponded¹ at length and worked together to clarify the request in an effort to reduce the costs² of the request. On August 2, WLBT filed a revised records request, limiting their request to “demand letters received, and settlement agreements executed between January 2013 and May 2016.” The same day, the city agreed to provide the demand letters, and partially denied the request for settlement agreements. In its written denial, the city stated:

Per the relevant settlement agreement entered into by the City of Jackson and the relevant parties, the actual settlement agreement is confidential. As such, your request for settlement agreements is denied because the executing parties are legally prohibited from disclosing it to third parties. However, some settlement agreements require Jackson, MS City Council approval, so, enclosed are the minutes evidencing the settlement agreements executed between January 2013 and May 2016, that required Jackson, MS City Council approval.

¹ Significantly, on June 28, 2016, in response to WLBT’s initial request, the city denied the request, claiming the documents were exempt as attorney work product. On July 11, 2016, WLBT filed a revised request, specifically excluding any documents protected by attorney work product. The city responded on July 19, 2016, with a cost estimate of \$1,530.15. Finally, WLBT submitted a revised request on August 2, 2016 to the city.

² The estimated cost for the July 11, 2016 request totaled \$1,530.15, and included \$1,102.08 for 60 hours of paralegal search and review at \$18.36/hour, and \$428.07 for 30 hours of scanning for records that do not exist in electronic format at \$14.26/hour.

1.2 On August 18, 2016, William Joslin, Corporate Council for Raycom Media, the parent company of WLBT, requested that the city provide the specific statutory or legal basis for the confidentiality of each settlement agreement that was denied, or a copy of the requested document.

1.3 Upon review, the city's attorney handling this public records request found that many of the settlement agreements did not contain confidentiality provisions and "decided to simply agree to release all responsive settlement agreements . . . subject to consent of the parties of the settlement agreements." On August 26, 2016, the city proposed two production alternatives to WLBT for settlement agreements not covered by a confidentiality provision, either:

The City can review each of the files that include responsive non-exempt settlement agreement and make a copy of each. Alternatively, the City can create a record that includes the name, brief claim description, and settlement amount.

The city stated it would produce an invoice for the alternative chosen by WLBT. The city also stated, with regard to settlement agreements containing a confidentiality provision, that:

[T]he City may be able to secure the consent of the parties to the agreements to the release of these confidential settlement agreements to you. Obviously this will require drafting such a request and actually securing a response, yes or no, from the parties to the agreement so, if interested, please let me know if you would like the City to prepare an invoice related to that as well."

1.4 In lieu of responding to the city, WLBT filed this Public Records Complaint with the Ethics Commission on September 16, 2016, requesting:

[T]he Ethics Commission to require the City of Jackson to produce all settlement agreements executed between January 2013 and May 2016 at a fee not to exceed the actual cost in searching, reviewing, and/or duplicating the records.

[And] to order the City to reimburse WLBT for its expenses incurred in bringing this complaint and impose the statutory penalty of \$100 for each record wrongfully denied . . .

1.5 WLBT argues that the city's untimely and repeated denial of WLBT's requests "on grounds it knew were erroneous, as is evident by the city's repeated assertion and then abandonment of defenses to production" was a knowing and willful denial of access to public records.

1.6 In its response dated September 28, 2016, the city argued that the city attorney handling the public records requests "operated in good faith, and under the belief that all actions taken were in accordance with the Mississippi Public Records Act." As part of its response and at no cost to WLBT, the city included settlement agreements responsive to WLBT's request "pulled thus far" and a list of "settlement amounts, dates and subjects from April 1, 2014 to August 26, 2016."

1.7 On October 5, 2016, WLBT responded to the city's response and requested the Ethics Commission "require the City to produce a complete set of the settlement agreements executed between January 2013 and May 2016. . . [and] require the City to provide confirmation that the production is complete and require the City to provide the list of settlement amounts, dates and subjects from January 2013 through April 2014, as offered by Ms. Blanchard in her letter."

1.8 On November 16, 2016, the city produced additional settlement agreement to WLBT, again, at no cost. In response, on the same day, WLBT submitted to the Ethics Commission "a list detailing the Settlement Agreements not yet supplied by the City to WLBT. . . ."

1.9 In an attempt to mediate this matter, Ethics Commission staff worked with both parties to facilitate production of the remaining settlement agreements sought by WLBT over a period of several months. Mediation was partially successful in that additional settlement agreements were located by the city and turned over to WLBT at no cost, on December 1 and 9, 2016. However, mediation was discontinued when, after an exhaustive search, the city concluded that it was unable to locate a number³ of settlement agreements responsive to the request, as those documents were no longer in the city's files and archives.

I. CONCLUSIONS OF LAW

2.1 The Mississippi Public Records Act of 1983 (the "Act"), codified at Section 25-61-1, *et seq.*, Miss. Code of 1972, provides that public records shall be available for inspection or copying by any person unless a statute or court decision "specifically declares" a public record to be confidential, privileged, or exempt. Sections 25-61-2 and 25-61-11. "Public records" are defined as all documents or records "having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body." Section 25-61-3(b).

2.2 The settlement agreements sought by WLBT are clearly public records, regardless of whether these agreements contain a provision requiring confidentiality. The city was unable to identify any statutory or court decision specifically exempting these settlement agreements as confidential or privileged and not subject to the Public Records Act. Further, the Mississippi Supreme Court has noted, "public records which do not fall into a carefully defined exception provided by law are entirely open to access by the general public." Mississippi Dep't of Wildlife, Fisheries and Parks v. Mississippi Wildlife Enforcement Officers' Assn., Inc., 740 So.2d 925, 931 (Miss. 1999). As such, the city violated the Public Records Act when it partially denied WLBT's request for settlement agreements protected by a confidentiality provision.

2.3 However, upon request by WLBT to review the denial, the city "decided to simply agree to release all responsive settlement agreements" and made good faith efforts to comply with the public records request by proposing two production alternatives to WLBT for the settlement agreements not covered by a confidentiality provision, as well as seeking the consent of the parties to the confidential settlement agreements. In fact, the city ultimately

³ From the record, it appears that the city was unable to locate 19 settlement agreements, but produced 70 other settlement agreements.

provided all the settlement agreements in its files and archives to WLBT, regardless of whether those agreements contained confidentiality provisions, at no cost.

2.4 That change of heart by the city was well-advised. Public records need not be provided when “any *constitutional or statutory law or decision of a court* of this state or the United States ... specifically declares a public record to be confidential[,] privileged [or] exempt.” Section 25-61-11. (emphasis added) However, the duties imposed by the Public Records Act may not be disposed by contract. No public body can agree to make a public record confidential. Therefore, confidentiality clauses in settlement agreements involving public bodies are null and void unless they are firmly grounded in some constitutional or statutory law or decision of a federal or Mississippi court.

2.5 The city’s failure to locate a number of settlement agreements responsive to the public records request is a retention issue outside of the jurisdiction of the Ethics Commission. The Act directs that “each public body must ensure reasonable access to records electronically maintained, subject to records retention.” Section 25-61-2. However, a public body is not required to retain every record it ever created or used. Model Rule 3, Comment 3.5. The Local Government Records Office of the Mississippi Department of Archives and History (MDAH) has issued general records retention schedules for counties and cities. Section 39-5-9. The retention period listed in the general schedules for each records series is the minimum time necessary to retain records. The unlawful destruction of public records can be a crime. Section 25-59-23.

III. CONCLUSION

WHEREFORE, IT IS HEREBY ORDERED as follows:

3.1 The Ethics Commission finds that the City of Jackson violated Section 25-61-5 of the Public Records Act by partially denying WLBT’s request based on confidentiality provisions contained in the requested documents.

3.2 The Ethics Commission orders the City of Jackson to refrain from citing confidentiality provisions contained in public records as the sole basis for denying any further public records requests and to strictly comply with Section 25-61-5 of the Public Records Act.

SO ORDERED, this the 14th day of February, 2018.

SONIA SHURDEN, Hearing Officer
Mississippi Ethics Commission